1964

The State of Utah v. Robert Delaney : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent

v.

ROBERT DELANEY,
Defendant-Appellant

No. 10073

APPELLANT'S BRIEF

Appeal from Judgment of the
5th District Court for Iron County
Hon. C. Nelson Day, Judge

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v.

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STATEMENT OF THE KIND OF CASE

This is an indictable misdemeanor, automobile negligent homicide case brought under Utah Code Anno. 1953, 41-6-43.10.

DISPOSITION IN THE LOWER COURT

The jury returned a verdict of guilty. The trial Court denied the defendant's motions for judgment notwithstanding the verdict and for a new trial.

RELIEF SOUGHT ON APPEAL

The defendant seeks a reversal of the verdict of guilty and a remand with instruction to enter a judgment of not guilty notwithstanding the jury's verdict, and in the alternative, a remand with instruction for a new trial.

STATEMENT OF THE FACTS

A one car accident about midnight, March 2, 1963, in Cedar Canyon, about two miles west of Cedar City, Utah, claimed the life of one of four occupants of the automobile. The defendant was charged with and tried for automobile negligent homicide under Utah Code Anno. 1953, 41-6-43.10.

At the trial, Officer John R. Williams testified for the State that he had been an investigating officer at the scene of the accident. He described the location of the car and the body (Tr. 6). He testified that he and Officer William Burch made markings to identify skid and other marks (Tr. 11, line 2). He spoke of finding beer cans at the scene (Tr. 11, line 8) and said that one of the occupants of the car, not the driver, had stated to him that he guessed they had been racing a little (Tr. 6, line 20). He testified that he had previously said that he believed the defendant had not been drinking, and he testified, that there was no indication that the defendant had been drinking (Tr. 14, line 2, 9).

Officer William Burch also generally described the accident scene (Tr. 23, line 28). He testified that he and others made markings to show the course of travel of the automobile (Tr. 27, line 16). He testified that he

made no measurement that night (Tr. 29, line 3) but that he and Sergeant Robert Reid and Trooper Elroy Mason returned in the morning and made measurements (Tr. 29, line 15). He testified in detail and illustrated his testimony by use of a blackboard (Tr. 30 and following).

Officer Burch testified concerning a skid test conducted by him (Tr. 53, line 30) and concerning the grade of the road and the "super elevation" (bank of the curve) of the road (Tr. 55, line 14; Tr. 56, line 1, 18).

He testified that he made so-called "chord mark" and "middle ordinate" measurements of a scuff mark at the scene (Tr. 66, line 1). He then testified that from these measurements of the scuff mark he calculated the radius of the curve of the scuff mark to be 707 feet (Tr. 67, line 2).

Officer Burch admitted on cross examination that at the time of the preliminary hearing he testified that "I don't know that we even measured it," (Tr. 101, line 22) with reference to essential details about the measurements and their location. He did not have his notes about the measurements at the preliminary hearing nor did he ever subsequently find them (Tr. 140, line 1-7).

On redirect examination he testified that some time subsequent to the preliminary hearing "Sergeant Reid and Trooper Mason and I determined together that that was where we measured. It was just opposite the 50 foot mark" with reference to the chord mark and the middle ordinate measurements (Tr. 128, line 6) and "We remembered where we measured it" (Tr. 139, line 20).

The defendant's motion to strike the testimony concerning these measurements was denied by the Court, the Court commenting that he did not think the officer was fabricating, that that question was for the jury, but the evidence would be retained on the recollection refreshed theory (Tr. 140, line 24).

Mr. Ed M. Pitcher of the Utah State Highway Patrol was called as an expert witness. He was asked hypothetical questions based upon the factual assumptions in Officer Burch's testimony including the radius of the scuff mark, the results of the skid test, the grade of the road, the super elevation of the road and other factors (Tr. 247, line 11). He testified that under the facts assumed in the hypothetical question a car would have been traveling from 99.9 to 101 miles per hour (Tr. 252, line 17, 28). He testified that a difference in the facts would make a difference in the result. Such differences might concern the material of the road (Tr. 255, line 24), foreign substances on the road (Tr. 255, line 29), moisture conditions (Tr. 256, line 7), the chord mark measurement and its location (Tr. 259, line 27).

The defendant testified that he had had four beers over a period of time earlier in the evening Tr. 473, line 24; Tr. 475, line 15). However there was no evidence that he was or appeared to be intoxicated. Several witnesses, including Officer Williams, Officer Burch, Dr. Graff, Diana Lynn Miller, Melvin Douglas Clark, and Kendall G. Cosslett, testified that the defendant did not appear to have been intoxicated (Tr. 14, line 2, 9; Tr. 85, line 23; Tr. 80, line 22; Tr. 368, line 17; Tr. 435, line 12; and Tr. 465, line 17, 21).

Mr. Higbee, another occupant of the car, testified that he did have beer with him but that the defendant had only one sip from an already opened can at the start of the trip, but not more (Tr. 299, line 27).

A motion by the State that the jury be taken to view the premises was granted but the view was not actually taken until near the end of the defendant's case in rebuttal. Prior to taking the view, the Court indicated its intention to have Officer Burch or Trooper Mason point out marks and other things and locations that had been testified to (Tr. 445, line 4).

Although the defendant objected to this proposed procedure (Tr. 446, line 20), Officer Burch and the Court did accompany the viewing party to the premises (Tr. 447, line 11). The Court itself took charge of the view, commencing by describing the scene and commenting about "still visible" marks on the road, "paint or crayon" on the road (Tr. 447, line 6), pointing out various things, making comments, and conducting a detailed, repetitive interrogation-discussion review with Officer Burch of his prior testimony concerning the scene and measurements (Tr. 447 through 460).

The Court answered a juror's question (Tr. 451, line 20). Other jurors asked questions which were answered by Officer Burch (Tr. 453, line 4, 12; Tr. 454, line 14, 21, 27; Tr. 455, line 9, 15, 17, 19, 21) or by the Court with a request to Officer Burch for approval of the answer given by the Court (Tr. 451, line 20; Tr. 454, line 29).

The Court propounded at least fifty-two questions to Officer Burch (Tr. 447, through 460), many of which

were leading questions (Tr. 447, line 28; Tr. 448, line 6, 10, 15, 24, 28; Tr. 449, line 24, 28; Tr. 450, line 13, 26; Tr. 451, line 7, 11; Tr. 451, line 20; Tr. 452, line 9, 21, 24; Tr. 454, line 8; Tr. 454, line 29; Tr. 456, line 14, 19; Tr. 457, line 13, 29; Tr. 459, line 25) or included as part of the question or otherwise an observation of fact (Tr. 449, line 11; Tr. 451, line 20; Tr. 452, line 9, 17, 27, 29; Tr. 454, line 29; Tr. 456, line 14).

Counsel for the State took no part in the proceeding conducted by the Court at the viewing of the premises (Tr. 460, line 10, 13).

Counsel for the defendant repeated his objection at the end of the viewing and the Court undertook a cautionary instruction upon resumption of the proceedings in the courtroom (Tr. 462, line 1).

The defendant testified in his own behalf that just before the accident his speed might have been between 45 and 65 miles per hour (Tr. 484, line 18, 27); that just before the accident he started to speak to Mr. Higbee in the back seat about some records for the record player which was in the front of the car (Tr. 485, line 11); that he did not recall whether he had both hands on the steering wheel or had turned to Mr. Higbee (Tr. 485, line 20); but that he did not turn his head far enough to see Mr. Higbee (Tr. 486, line 3); and that he then heard gravel under the car and the accident occurred (Tr. 486, line 7).

He further testified that at the time he heard the gravel his speed was between 50 and 65 miles per hour (Tr. 489, line 2). He testified that when the car was

used for participation in supervised drag races it was specially tuned up and equipped (Tr. 489, line 21) but that it was not in that condition at the time of the accident (Tr. 490, line 1).

Mr. Higbee, one of the occupants of the car, testified that the automobile was not traveling at the rate Mr. Pitcher had estimated but that at the most it might have been up to 55 or 60 miles per hour (Tr. 280, line 22; Tr. 302, line 26).

Mr. Allen Brent Hatch, a witness in a passing car, estimated the speed of Mr. Delaney's car to be 70 at the highest (Tr. 317, line 2). His companion, Miss Sylvia Gale, testified that there was nothing unusual about the operation of the Delaney vehicle (Tr. 321). She doubted that it was traveling 70 miles per hour (Tr. 325, line 16) but did not think her companion necessarily wrong in his estimate (Tr. 325, line 24).

Mr. Gary Mackelprang, an occupant of a following vehicle, testified that he had made a statement that the defendant's automobile might have been going 70 miles per hour (Tr. 337, line 2), but his then testimony under cross examination by the State was that the speed could have been as high as 70 but he doubted it (Tr. 336, line 29.)

Diana Lynn Miller, the fourth occupant of the defendant's car testified that the defendant did not appear intoxicated (Tr. 368, line 19); that there was nothing unusual about his behavior (Tr. 386, line 17); that the operation of the vehicle seemed normal on the trip up the canyon (Tr. 375) and that there was no warning

or indication that the accident was going to happen (Tr. 378, line 21).

There was evidence that the posted speed limit on the road was 50 miles per hour (Tr. 68, line 28).

The jury found the defendant guilty. The Court denied defense motions for judgment at the close of the State's case, for judgment notwithstanding the verdict, and for a new trial.

The foregoing statement of facts mentions in brief form the substantive and procedural matters which the defendant deems pertinent to the disposition of this appeal. In so doing, however, it necessarily omits considerable evidentiary detail which can only be covered by recourse to the entire record.

ARGUMENT

POINT I. THE COURT'S PARTISAN PARTICIPATION IN THE ROLE OF PROSECUTING ATTORNEY AT THE VIEW, THE COURT'S AND OFFICER BURCH'S CONDUCT AT THE VIEW, THE COURT'S COMMENTS ON THE EVIDENCE AND THE POSSIBLE IMPRESSION THAT THE COURT WAS HOSTILE TO THE DEFENDANT DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The State's case depended upon proof of such speed as might constitute driving in reckless disregard of the safety of others. The State's case consisted of two stages. In the first, Officer Burch provided the factual founda-

tion needed for an expert witness's opinion as to speed. In the second, Mr. Ed M. Pitcher provided the opinion as to speed.

Officer Burch testified as to all of the important elements of the foundation needed for the expert witness, including the skid test conducted by him, measurements and calculations by him, the grade of the road and the bank of the curve. The expert witness conducted no tests and made no measurements.

On cross examination Officer Burch conceded that at the preliminary hearing he had not remembered certain essential facts concerning the alleged measurements and even that he had then stated that he did not know if they had been measured (Tr. 101, line 23, 27). The Court expressed its opinion that Officer Burch was not fabricating but that this was up to the jury (Tr. 140, line 24).

Relying upon the factual foundation derived from Officer Burch's testimony, including the questionable measurements and calculations, the State's expert witness, Mr. Pitcher, estimated the speed of the automobile to be 99.9 to 101 miles per hour at the time of the making of the scuff marks.

Mr. Pitcher said that alteration of the facts assumed in the hypothetical question would alter the result. This included the skid test, road conditions, and particularly the cord mark measurements. From the chord mark measurements the radius of the arc of the scuff mark can be determined and this figure is used in calculating speed.

All of the elements used for the hypothetical question, and particularly the chord mark measurements and the calculations derived therefrom, were contested by the defendant. Their proof was an essential part of the State's case. The jury view of the premises was part of the State's attempt to prove its case.

The Court granted the State's request that the jury view the scene, indicating in so doing that it intended to have either Officer Burch or Trooper Mason point out marks and things at the scene. Despite the defendant's objection to this procedure, it was followed by the Court. Instead of appointing showers as required by Utah Code Anno. 1953, 77-31-31, the Court and Officer Burch served that function. The Court commenced with a general description of the scene referring to what he called still visible paint or crayon marks and to nails driven into the road. The Court conducted a lengthy interrogation-discussion with Officer Burch reviewing the testimony he had given in court concerning the physical evidence, markings, measurements and other details of the scene. The following Court-Burch discussion is typical (Tr. 447):

The Court: This is the point where the scuff mark or skid mark that you testified to in your testimony commenced, is that correct?

Burch: Yes.

The Court: Now, will you point out where it went from this point?

Burch: This is the point that it crossed the center line. (Indicating)

The Court: We are now at a point, as I recall, 60 feet from the initial point where you had marked with the red crayon, is that correct?

Burch: Yes, sir. That is correct.

The Court: And this is the point where the scuff mark or skid mark that crossed the original painted center line of the highway, and this is approximately 60 feet in an easterly direction, is that correct?

Burch: That's right.

The Court: And you have designated this by a nail driven into the yellow line?

Burch: That's right.

The Court: And it is visible at this point?

Burch: Yes.

The Court undertook to answer questions posed by jurors, requesting Officer Burch's approval of his answers. For example (Tr. 451, line 19):

Juror Irene Bryant: Is this the area that supposedly the car had hit the bank?

The Court: I'm under the impression, and if you gentlemen who investigated this could correct me, but where the gravel first came out on the road — that is large quantities of it, was where the car hit the bank and it knocked the gravel out onto the road; and that was down where we were just talking about. Is that correct, Officer Burch?

Burch: Yes.

Another example (Tr. 454, line 14):

Juror Meeks Dalton: I'd like to ask the distance from here to where the car left the road on the opposite side from where it started.

The Court: You mean left the road on the north side?

Juror Dalton: Yes.

The Court: Well —

Juror Dalton: Where it tipped on its top.

The Court: Well, you are asking before it tipped on its top. Now Officer Burch, down where it tipped on its top — this is something I don't recall there was testimony given about.

Burch: I don't know exactly on it top, no.

The Court: Apparently it slid for some distance on its top, Mr. Dalton, and where it tipped and went on its top, you wouldn't know, would you?

Burch: Not exactly, no.

Utah Constitution, Article I, § 12, states:

> In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury. . . .

Utah Code Anno. 1953, 77-31-31, provides:

> [Q]uestions of law are to be decided by the court, and questions of fact by the jury; . . .

The law is clear on several basic propositions dealing with the right of an accused to an impartial jury trial of the facts of his alleged offense.

The jury shall be the sole trier of facts. *People v. Biddlecome,* 3 Utah 208, 2 Pac. 194 (1882); *State v. Bayes,* 47 Utah 474, 155 Pac. 335 (1916); *State v. Green,* 89 Utah 437, 57 P.2d 750, 755 (1936) (dicta); *State v. Green,* 78 Utah 580 6 P.2d 177 (1931); *State v. Thatcher,* 108 Utah 63, 157 P.2d 258 (1945).

It is equally well established that the judge shall not comment on the evidence. *State v. Green,* 78 Utah 580, 6 P.2d 177 (1931); *State v. Gleason,* 86 Utah 26, 40 P.2d 222 (1935) (dicta); *State v. Greene,* 33 Utah 497, 94 Pac. 987 (1908); *State v. James,* 32 Utah 152, 89 Pac. 460 (1907).

The credibility of witnesses is a question solely for the jury. *State v. Diaz,* 76 Utah 463, 290 Pac. 727 (1930); *State v. Green,* 89 Utah 437, 57 P.2d 750 (1936) (dicta).

Although not always error, allowing the jurors to ask questions is properly frowned upon. *State v. Martinez,* 7 Utah 2d 387, 326 P.2d 102 (1958); *State v. Anderson,* 108 Utah 130, 158 P.2d 127 (1945).

The intimate, partisan, detailed participation by the Court at the scene as though he were the prosecuting attorney rather than the judge could only result in the jury's minds in such an association of the judge with the State's case and its key witness, upon whose credibility and accuracy the entirety of the State's case depended, as would invariably give the impression that the Court favored the witness and believed his testimony. This we believe to be substantial, fundamental error, for while it may be proper for the Court to ask questions in appro-

priate cases, it is manifestly improper for the Court to usurp the functions of counsel. *State v. Green,* 89 Utah 437, 57 P.2d 750 (1936) (dicta); *People v. Rigney,* 10 Cal. Rptr. 625, 359 P.2d 23 (1961) (dicta); *People v. Robinson,* 4 Cal. Rptr. 50 (1960); *Hunter v. United States,* 62 F.2d 217, 220 (5th Cir. 1932).

Extended interrogation cannot fail but to give an impression of belief or disbelief, depending on the circumstances. As this court explained in *State v. Green,* at page 755:

> It is generally held that in the exercise of his right to question a witness, the judge should not indulge in an extensive examination or usurp the function of counsel. In a criminal case he should not by form of question or manner or extent of examination indicate to the jury his opinion as to the guilt of the defendant or the weight or sufficiency of the evidence. Note, 84 A.L.R. 1172; . . . His examination should not be extensive because it is a matter of much difficulty for any person to indulge in an extensive examination of the witness without indicating a train of thought or some feeling with respect to the truth or falsity of the testimony being elicited. . . .

Counsel for the State did not need the Court's able assistance for their conduct of their case was thorough, professional and competent. *State v. Crotts,* 22 Wash. 245, 60 Pac. 403 (1900) held it error for the Court to take over the examination of a witness and to ask leading questions when the counsel for the State was doing a capable job, for the reason that:

> [I]t is a fact well and universally known by courts and practitioners that the ordinary juror is

> always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if know to the juror, has a great influence upon the final determination of the issues. This information can be conveyed as readily to the jury by leading questions asked of them, and the manner of the judge in asking such questions, as by a direct comment upon the testimony in the charge to the jury.

The recent case of *People v. Robinson,* 4 Cal. Rptr. 50, (1960) held that it was error for the Court to take over the duties of the district attorney in the questioning of witnesses for in so doing he gives the jury the impression that he as allying himself with the prosecution with inevitable harm to the defendant being the result.

Other instances at the trial add to the cumulative effect of the Court's partisan participation. For example, the Court's comment that he did not think Officer Burch was fabricating his testimony with reference to the contested chord mark and middle ordinate measurements would serve to indicate credibility of the witness in the opinion of the Court (Tr. 140, line 24). At another point the Court expressed belief in the testimony of the witness concerning the air pressure in the tires of the automobile (Tr. 131, line 27).

And, immediately after the State commenced its cross examination of the defendant by asking the following question and getting the following answer:

> Question: With respect to your automobile, Mr. Delaney, isn't it a fact that it had a standard four-speed transmission in it?

Answer: Yes, it did. But you could order one from the factory.

the court interjected:

> Mr. Delaney, he didn't ask you if you could order one. He asked you what your car had. It is true that people can buy anything. Just answer the questions that are asked you. Go ahead, Mr. Gardner. (Tr. 491, lines 5-13)

Each of these numerous errors deprived the defendant of his right to a fair jury trial. Whether considered individually or cumulatively, the Court's partisan participation in the role of prosecuting attorney, the manner of conducting the view with the Court and the key witness for the State as joint showers and testifiers, the comments on the evidence during the view and the trial, and the possible impression that the Court was hostile to the defendant deprived the defendant of his right to a fair jury trial and constituted prejudicial error of a most fundamental nature.

POINT II. IT WAS PREJUDICIAL ERROR FOR THE COURT AND THE STATE'S KEY WITNESS TO CONDUCT THE VIEW OF THE PREMISES CONTRARY TO THE MANNER PROVIDED BY THE CLEAR AND EXPLICIT PROVISIONS OF UTAH CODE ANNO. 1953, 77-31-26.

Utah Code Anno. 1953, 77-31-26, provides that when the court deems a view proper

> . . . [I]t may order the jury to be conducted in a body, in the custody of an officer, to the place,

> which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor do so himself, on any subject connected with the trial . . .

This statute does not authorize the Court to accompany the jury to the scene; it does not authorize the taking of evidence, let alone a substantial amount of it, at the scene; it does not authorize the Court and the prosecution's key witness to act as showers at the scene.

In *State v. Mortensen,* 26, Utah 312, 73 Pac. 562, at 573 (1903) this court quoted with approval language from another opinion to the effect that a similar statute did not intend the judge to accompany the jury and that the statute commands that no one but the appointed officer speak to the jury and they are forbidden to speak about the subject of the trial.

Substantial authority says that it is improper to take evidence at the viewing of the premises. E.g., *State v. McVeigh,* 35 Wash. 2d 493, 214 P.2d 165 (1950); *Scruggs v. State,* 34 Okla. Cr. 97, 244 Pac. 838 (1926).

The statute plainly provides that the jury are to be conducted to the view by an officer sworn to suffer no person to speak to or communicate with the jury, nor to do so himself, on any subject connected with the trial. Instead of complying with this clear requirement, the Court conducted what amounted to an extensive review session of that evidence which was most damaging to the defendant. This review session was a joint venture between the Court and the State's key witness, Officer Burch. The statute authorizes the use of an impartial

person as a shower, it does not authorize, nor can we sanction, the type of partisan evidence taking, comments, and general review of the State's key witness' testimony by himself and the Court at the viewing.

Even in civil cases it has been held in error for a witness truck driver to participate in a viewing to the extent of merely pointing out where he commenced passing another vehicle. *Martin v. Tipton,* 261 S.W. 2d 809 (Ky. 1953).

Even more so in a criminal case should the defendant have the right to have the proper procedures followed. The manner of the viewing in the instant was not only contrary to the plain wording of the statute, but apart from that constituted prejudicial error because of the partisan participation by the Court and the taking of evidence in such a mannner as to imply that the Court believed the testimony of Officer Burch. On either ground it constitutes reversible error. It deprived the defendant of a statutory safeguard for a fair trial and it deprived him of a fair trial.

POINT III. THE COURT ERRED IN NOT STRIKING OFFICER BURCH'S TESTIMONY CONCERNING THE CHORD MARK MEASUREMENTS FOR THE REASON THAT SUCH TESTIMONY WAS NOT WITHIN THE SCOPE OF THE RECOLLECTION REFRESHED RULE AND WAS NOT INDEPENDENT RECOLLECTION OF MATTERS WITHIN THE PERSONAL KNOWLEDGE OF THE WITNESS.

The accident occurred on March 2. The measurements, if any, were taken within a few hours. The preliminary hearing was held on April 12 (Tr. 141, line 29). At the preliminary hearing, Officer Burch had neither notes nor recollection as to where the important chord mark measurements were made. He testified "I don't know that we even measured it." (Tr. 139, line 5)

On examination by the State, Officer Burch said he never did find the purported notes (Tr. 140, line 1-7). In response to the question of how he did determine the placement of the measurements, he answered "Sergeant Reid and Trooper Mason and I determined together that that was where we measured," (Tr. 128, line 6) and "We remembered where we measured it." (Tr. 139, line 20).

The Court refused to strike the evidence, giving as the reason that it was admissible as recollection refreshed.

The doctrine of recollection refreshed is not applicable to the instant situation. It is properly used when a witness on the stand cannot remember details of a matter, which details had been reduced to writing, and the writing is used for refreshing an independent recollection. Its purpose is to allow the witness to testify from an independent memory that the facts are true. *Com. v. Jeffs,* 132 Mass. 5 (1882).

In the instant case it seems quite clear that Officer Burch was not testifying from an independent memory of the facts but from a reconstructed "group recollection" resulting from the discussion among two others, who did not testify as to the pertinent facts, and himself. This

kind of a reconstructed group recollection is an inadmissible mixture of conjecture and hearsay, two-thirds of which is not subject to cross examination and which does not meet any criterion for admission.

In addition to error in admitting the evidence at all, the Court indicated that it did not think Officer Burch was fabricating, thus adding the weight of the Court to highly questionable evidence, evidence which went to the heart of the State's case.

The witness did not even remember when the purported discussion took place. He could not even place the month (Tr. 142, line 1-14).

We respectfully submit that under the circumstances it is clear that the witness did not testify from an independent recollection of the facts but from a reconstructed group recollection which was not independent knowledge of the facts at all but conjecture and hearsay. It was error to fail to strike this evidence at the defendant's request for allowing it to remain materially prejudiced his right to a fair trial.

POINT IV. THERE IS INSUFFICIENT EVIDENCE UPON WHICH THE JURY COULD HAVE FOUND THE DEFENDANT GUILTY.

Unfortunately accidents can and do happen. We do not condone negligent or careless driving, nor do we oppose attempts to improve highway safety. On the other hand, however, an indictable misdemeanor conviction is a serious matter and one which requires not negligence,

nor gross negligence, but conduct more extreme than either of these two degrees of negligence. *State v. Berchtold*, 11 Utah 2d 208, 357 P.2d 183 (1960).

The only possible evidence of such wanton conduct as could have justified a jury verdict is that evidence of speed developed by the testimony of Officer Burch and Mr. Pitcher.

We respectfully submit that the credible evidence legally before the jury did not and could not support a verdict of guilty. We submit that the verdict was based upon the aura of credibility which the Court's partisan participation gave Officer Burch's testimony, upon evidence improperly received at the viewing of the premises and the other errors enumerated in the prior points of this brief. In addition, the viewing itself must have improperly swayed the jurors although the view is not properly evidence for them to consider but merely an aid to understanding the evidence. *State v. Mortensen,* 26 Utah 312, 73 Pac. 562 (1903).

If we strip away the effect of the Court's participation errors, the effect of the view errors, and the improperly admitted testimony of Officer Burch relating to the measurements, there is, we respectfully submit, no credible evidence as to such speed as to constitute reckless disregard of the safety of other.

Even if the testimony of Officer Burch is not stricken, but is viewed as it should be if retained, the conclusion must be the same for in the posture in which it arises, his testimony is not sufficiently credible to support a conviction for it is patently contradictory to his sworn

testimony in a prior related proceeding and is only group recollection reconstructed and not independent evidence of the facts involved.

We respectfully submit that it was error for the Court to refuse to grant the defendant's motion for judgment notwithstanding the verdict.

CONCLUSION

The defendant respectfully submits that there is insufficient eivdence to support the verdict of guilty and that the several procedural errors discussed herein deprived the defendant of his constitutional right to a fair trial of the facts by an impartial jury.

The defendant prays this court to reverse the trial court and to remand the case with instructions to enter a judgement of acquittal notwithstanding the verdict, or in the alternative to remand the case for a new trial.

Respectfully submitted,

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